Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TOM EASTON,

Petitioner,

v.

JAMES FALLMAN; RICHARD BARTON; TOM FELKER; HARLAN WATKINS; ROBERT AYRES; STEVEN CAMBRA; DAVID TRISTAN; CDC Director CAL TERHUNE; former CDC Director JAMES GOMEZ; inmate MICHAEL TAYLOR; and DOES ONE THROUGH FIFTY, each in his official and individual capacity,

Respondents.

On Petition For Writ of Certiorari
To The Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the Ninth Circuit ignore the sole federal appellate precedent ruling on an attorney's First Amendment and equal protection right of access to prison inmate clients, the Third Circuit's *Sturm v. Clark*, 835 F.2d 1009 (1987), and grant qualified immunity to respondent Pelican Bay prison warden who banned petitioner from all access to his inmate clients, by visiting and the U.S. mail for five years, on the specious ground of no controlling authority in the Ninth Circuit?

2. May the Ninth Circuit ignore this Court's ruling in *Saucier v. Katz*, 533 U.S. 194 (2001), that when determining qualified immunity the alleged facts must first be taken in the light most favorable to the party asserting the injury, and grant summary judgment based on assumed knowledge, which the Court even acknowledged as possibly incorrect, on the part of respondent prison warden a month before the alleged knowledge even occurred?

3. May the Ninth Circuit ignore this Court's rule of *Brady v. Maryland*, 373 U.S. 83 (1963), distinguishing between prosecutorial and investigative functions by falsely denying that appellant raised the argument, when in fact petitioner cited to *Kalina v. Fletcher*, 522 U.S. 188 (1997) in his opening brief?

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INTRODUCTION

The Ninth Circuit Court of Appeal has nullified the 1987 Third Circuit Court of Appeal ruling in *Sturm v. Clark*, 835 F.2d 1009, that established attorneys' First and Fourteenth Amendment rights of access to prison inmates, by mistakenly affirming summary judgment by the District Court in this § 1983 action.

The grant of qualified immunity supporting the summary judgment was mistakenly based on a factual impossibility.

On September 27, 1996 the warden banned petitioner and attorney Easton from Pelican Bay State Prison on the vague and false pretext of compromising security of the prison. But prison staff only intercepted in November 1996 letters written in October 1996 by Easton to his inmate clients. It was impossible for the warden to know in September that Easton might write letters in October.

The only reasonable inference from the alleged facts, taken in the light most favorable to the injured party as required by *Saucier v. Katz*, 533 U.S. 194, is that the warden banned Easton to stop him from filing more inmate lawsuits, the most prominent of which he had filed in May 1996 and which resulted years later in a settlement of $60,000 for the inmate.

The ban on visiting, and the January 1997 ban on all use of the U.S. mail, both of which lasted for five years until the injunctive relief claim was settled, violated Easton's right of access to inmate clients under the First and Fourteenth Amendments.

OPINIONS BELOW

The unpublished memorandum opinion of the U. S. Court of Appeals for the Ninth Circuit, *Easton v. Fallman, et al.*, 2003 U.S. App. LEXIS 23904, was filed on November 21, 2003 in San Francisco, California [Appendix 1-4]. The judgment of the U. S. District Court for the Northern District of California, *Easton v. Fallman, et al.*, 2001 U.S. Dist. LEXIS 460, was decided and filed January 18, 2001 [Appendix 5-26]. The Petition for Rehearing in the U. S. Court of Appeals for the Ninth Circuit, was denied January 2, 2004 [Appendix 27].

BASIS FOR JURISDICTION

This Petition for Certiorari under Rule 10 is based on 28 U.S.C. § 1254 as review of the conflict between this Ninth Circuit decision and the Third Circuit's *Sturm v. Clark* on attorneys' First and Fourteenth Amendment rights of access to prisons; and it is timely under Rule 13.3 as less than 90 days from the January 2, 2004 denial of the petition for rehearing.

STATUTORY PROVISIONS

This appeal is based on an attorney's right of access to his prison inmate clients by use of the U.S. mail and by visiting under the First Amendment's requirement that *"Congress shall make no law . . . abridging the freedom of speech"* and the Fourteenth Amendment's that *"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."*

STATEMENT OF THE CASE

Easton is a duly admitted attorney whose office was in Crescent City, California, some nine miles from Pelican Bay State Prison. Easton had been filing numerous cases for prison staff and inmates. On May 23, 1996, he filed *Hymes v. Bridges*, (USDC ND CA) C96-1899-SI. *Hymes* was a notorious case as C/O Bridges, at the instigation of Warden Cambra, was arrested the same day for excessive violence in the beating, by several officers, of inmate Hymes while chained to a gurney. Four years later Hymes won $60,000 in settlement based on Easton's work and his whistleblower, expert witness Sgt. John Cox.

On June 26, 1996, Pelican Bay litigation coordinator Tom Felker sent the prison's secret dossier on Easton to deputy district attorney Fallman.

In August 1996, a disgruntled former inmate client, Taylor, made false accusations against Easton to prison staff. Taylor sought revenge for Easton's dropping him and his illegal Criminal Research Association ("CRA"), a scam on other inmates and the courts which had the apparent approval of the prison.

On September 27, 1996, Warden Cambra, knowingly or recklessly, used those false accusations to ban Easton from visiting Pelican Bay inmates. The only reason stated for the ban was a vague reference to compromising the security of the prison. Cambra then initiated criminal charges and Easton was tried and convicted in January 1997 of a misdemeanor. Easton was only exonerated on October 15, 1998 after submitting evidence of Taylor's perjury.

Unknown to Easton until researching the appeal in this case in late 2001, Taylor was well known to Pelican Bay staff in 1996 as a perjurer in his efforts to get transferred out of Pelican Bay. U.S. District Court Judge Fern Smith ruled on October 1, 1996, in *Taylor v. Gomez,* 1996 U.S. Dist. LEXIS 14940, that Taylor's frivolous claims justified a finding of judicial process abuse, basing that on Felker's declaration in support of summary judgment.

Following Easton's wrongful conviction on January 3, 1997 Cambra on January 15 also ordered staff to return any mail sent by Easton to inmates at Pelican Bay State Prison, alleging falsely that the1996 criminal proceeding against Easton had revealed that Easton had endangered an inmate's safety.

Yet the same information in Easton's letters was in the local newspaper prior to his writing. The only reasonable inference is that the prison staff delayed placing Taylor in protective custody in the hopes that he would be attacked by other inmates, and the blame thus laid on Easton's letters to his inmate clients warning them of Taylor. No harm was ever done to Taylor and he soon obtained his goal of a transfer out of Pelican Bay prison to a "soft yard."

Only five years later did Easton have his right to use the U.S. mail and visit inmates restored, as a result of settling his claim for injunctive relief, following the grant of summary judgment to defendants on his other claims of violations of civil rights. Easton timely appealed the summary judgment.

REASONS FOR GRANTING THE PETITION

A. THIS DECISION CONFLICTS WITH THE THIRD CIRCUIT'S *STURM V. CLARK*

In 1987 the Third Circuit Court of Appeal ruled that attorney Sturm stated a claim under the First Amendment when the prison made a rule regarding visitation that applied only to her. *Sturm v. Clark*, 835 F.2d 1009, 1014-1016.

Sixteen years later the Ninth Circuit Court of Appeal in the instant case disingenuously ruled that "there is and was no controlling authority on First Amendment rights enjoyed by an attorney *for an inmate.*" [App.4]. [Emphasis added.] But the instant case concerns Easton's own rights as an attorney, not derivative rights of inmate clients.

The Ninth Circuit compared "*Crusoe v. DeRobertis*, 714 F.2d 752, 756-57 (7th Cir. 1983) (holding that a paralegal failed to state a First Amendment claim where he was legitimately excluded from a state prison)" with *Sturm v. Clark* and concluded mistakenly that "the law was not clearly established . . . and the State Defendants were properly entitled to qualified immunity, in any event." [App. 4].

This was clear error as a paralegal, who was a former convict with a record of trouble making as in the older 1983 case of *Crusoe*, cannot properly be compared to an attorney with a First Amendment right of access to inmate clients. *Sturm* was decided four years after *Crusoe*, yet failed to even mention

Crusoe in passing since it was irrelevant to the analysis of attorneys' First Amendment rights.

Further, even if one examined only inmates' rights to access to attorneys, the regulations governing the conduct of prisons in California clearly support those rights, which would be derivative for attorneys:

> "Inmates have a constitutional right of access to an attorney. It is the policy of this department to facilitate both correspondence and personal consultation for this purpose." 15 CCR § 3175.

Moreover, the *Sturm* court noted that:

> "On remand, the district court should permit Sturm to amend her complaint to allege the deprivation of her first amendment rights. The complain simply fails to specify whose rights are at issue, Sturm's or those of her clients. Moreover, the court should consider whether Allenwood's practice violates the attorney-client privilege and, if necessary, whether Sturm has standing to assert the first amendment rights of inmates." *Sturm*, at 1015, fn. 13.

The Ninth Circuit has obfuscated the issues in a vain attempt to grant qualified immunity on the ground of lack of controlling authority. The rights of paralegals, especially former convicts, are not reasonably related to the rights or duties of attorneys' access to inmate clients.

The *Sturm* court further held that she had a valid equal protection claim against the prison because the directives were not rationally related to the prison's legitimate security interests. *Sturm*, at 1016-1017.

In the instant case, the Ninth Circuit has failed to explain how the State Defendants could have been acting reasonably in banning Easton from any contact with inmates. This was especially true after October 1998 when Easton's conviction was vacated upon proof of the inmate's perjury at trial.

The Ninth Circuit simply asserts without reference to the factual allegations that:

> "The State Defendants *appear* to have acted reasonably in banning Easton from visiting or communicating with inmates when the Defendants had reason to believe *(even if incorrectly)* that Easton had done things that placed the lives of some inmates in danger." [App. 3-4]. [Emphasis added.]

The allegation that Easton's letters to inmate clients had endangered Taylor ignored the fact that The Triplicate, the local newspaper, published all the information about Taylor before Easton's letters.

Easton had First Amendment rights to inform his inmate clients of Taylor's machinations. It was only Taylor himself, who later with a promise of $10,000 solicited another inmate at Folsom prison to kill Easton, that was guilty of endangerment.

B. THIS DECISION VIOLATES THIS COURT'S RULING IN *SAUCIER V. KATZ* THAT ALLEGATIONS ARE TO BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE INJURED PARTY

The Ninth Circuit's ruling that State Defendants acted reasonably was error since the facts alleged by Easton are to be viewed in the light most favorable to him as the injured party for the purpose of determining qualified immunity.

This Court has stated the rule very clearly:

> "A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier v. Katz*, 533 U.S. 194; 121 S. Ct. 2151, 2156; 150 L. Ed. 2d 272, 281 (2001).

The Ninth Circuit ignored *Saucier's* directive and instead assumed the good faith of respondent warden could be evidenced by the hearsay and double hearsay declaration of Felker, even if that was based on admittedly possibly incorrect knowledge.

Easton alleged that the September 27, 1996 ban on his visiting Pelican Bay prison was in retaliation for his filing numerous lawsuits, and most especially *Hymes v. Bridges* on May 23, 1996.

Easton alleged that the prison cynically delayed placing his false accuser, inmate Taylor, in protective

custody for some days, hoping that other inmates would attack him and the blame laid on Easton, even though The Triplicate, the local newspaper, had already named Taylor as Easton's accuser.

Easton alleged that all of the inadmissible hearsay and double hearsay supporting the motion for summary judgment was trivial in nature. Pelican Bay's secret dossier was called "a stack of exhibits that are not accompanied by an authenticating declaration" by the district court when it stated "it may not consider them," ORDER GRANTING SUMMARY JUDGMENT, Jan. 18, 2001. [App.13, *see also* App.9].

Easton objected to the hearsay secret dossier, but to no avail as it had its expected adverse effect. After its improper submission the district court reversed its previous order of September 26, 2000, in which the court found that Easton had valid First Amendment and equal protection claims based on *Sturm v. Clark*.

Despite its hearsay nature, the declaration of Felker was improperly admitted for the ostensible purpose of showing not the truth, but only for what Cambra "believed." This was error and could not constitute good cause for denial of access to inmates.

Easton demonstrated that the warden's initial ban of visiting on September 27, 1996, was completely without foundation, as the alleged danger from Easton's October 1996 letters could not have been known to prison staff until November 1996. Thus the decision was based on an impossibility and ignored the threshold question, the rule of *Saucier*.

C. THE COURT ERRED IN DENYING THAT APPELLANT RAISED ARGUMENT AGAINST ABSOLUTE IMMUNITY

The Ninth Circuit decision asserted that "Easton failed to raise an argument on appeal challenging the County Defendants' absolute immunity" and thus affirmed the dismissal of the County Defendants. [App. 1]. This was an egregious error.

In appellant's opening brief filed on November 20, 2001, Easton quoted from *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997), and then commented:

> "Thus a former Attorney General of the United States went to prison while deputy district attorney Fallman in California has so far escaped any sanction from similar suppression of evidence. The District Court admitted that the conduct may have been wrongful but refuses to sanction such misconduct; and, further, denied Easton's motion to file a Sixth Amended Complaint with newly discovered evidence of that misconduct (ER 8, CR 87)." APPELLANT'S OPENING BRIEF, 26.

Ignoring completely an argument raised in an opening brief is not proper. Asserting incorrectly that it was never raised is highly improper.

Newly discovered evidence revealed that respondents not only had knowledge of inmate Taylor's willingness to perjure himself, but also that respondents were acting together prior to that in reaction to Easton's filing lawsuits against the prison.

CONCLUSION

The Ninth Circuit must not be allowed to nullify the Third Circuit's *Sturm v. Clark*, nor ignore this Court's requirements of *Saucier v. Katz*, *Brady v. Maryland*, or *Kalina v. Fletcher* by this erroneous decision.

The First Amendment and equal protection rights of all attorneys practicing prison inmate law, not only in California but in all of these United States, will be diminished if this decision is not reversed.

Petitioner therefore requests that the Court grant this Petition for Writ of Certiorari to the Ninth Circuit Court of Appeal.

Respectfully submitted,

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THOMAS DEWEY EASTON, Plaintiff - Appellant, v. JAMES FALLMAN; RICHARD BARTON; HARLAN WATKINS; STEVEN J. CAMBRA, JR., Warden; CAL TERHUNE; JAMES H. GOMEZ, Director; MICHAEL TAYLORE; ROBERT AYRES, Defendants - Appellees, and, JEFFREY M. BRIDDLE; JOHN TAYLOR; LINNEA M. HANSON, Defendants.

No. 01-16568

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2003 U.S. App. LEXIS 23904

October 9, 2003, Argued and Submitted, San Francisco, California

November 21, 2003, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-99-04795-CRB(JL). Charles R. Breyer, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: THOMAS DEWEY EASTON, Plaintiff - Appellant, Pro se, Eugene, OR.

For JAMES FALLMAN, RICHARD BARTON, Defendants - Appellees: Nicholas R. Kloeppel, Esq., John M. Vrieze, Esq., MITCHELL, BRISSO, DELANEY & VRIEZE, Eureka, CA.

For HARLAN WATKINS, STEVEN J. CAMBRA, JR., CAL TERHUNE, JAMES H. GOMEZ, MICHAEL TAYLORE, ROBERT AYRES, Defendants - Appellees: Jessica N. Blonien, Esq., Brian G. Walsh, AGCA - OFFICE OF THE CALIFORNIA ATTORNEY GENERAL (SF), San Francisco, CA.

JUDGES: Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

OPINION:

MEMORANDUM *

- - - - - - - - -Footnotes - - - - - - - - - - - - -
* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.
- - - - - - - - End Footnotes- - - - - - - - - - [*2]

Plaintiff Thomas Dewey Easton appeals the district court's adverse judgment in his action brought pursuant to 42 U.S.C. § 1983. Because the parties are familiar with the facts, we recount them only as necessary. We affirm.

Easton alleged that officials from the Del Norte County District Attorney's Office ("County Defendants") withheld exculpatory evidence in

violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). The district court granted County Defendants' motion to dismiss on the grounds that they were entitled to absolute immunity. Because Easton has failed to raise an argument on appeal challenging the County Defendants' absolute immunity, we affirm the dismissal of the County Defendants. *See Officers for Justice v. Civil Service Comm'n*, 979 F.2d 721, 726 (9th Cir. 1992).

Easton also alleged that prison officials currently or formerly employed by the California Department of Corrections ("State Defendants") violated his First Amendment rights by banning him from visiting prison inmates or sending them mail. The district court granted State Defendants' motion for summary judgment on the ground [*3] of qualified immunity.

We review a grant of qualified immunity de novo. *Case v. Kitsap County Sheriff's Dep't*, 249 F.3d 921, 925 (9th Cir. 2001). A public official is entitled to qualified immunity unless: (1) plaintiff alleged facts that show a constitutional violation, and (2) it was clearly established at the time that the official's conduct was unlawful. See *Saucier v. Katz*, 533 U.S. 194, 200-02, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). The district court did not decide whether Easton's claim, as reviewed at the stage of summary judgment, represented a constitutional violation. Prison restrictions are usually upheld so long as a valid, rational connection exists between the restriction and the prison's security concerns. *See Overton v. Bazzetta*, 156 L. Ed. 2d 162, 123 S. Ct. 2162, 2168 (2003). The State Defendants appear to

have acted reasonably in banning Easton from visiting or communicating with inmates when the Defendants had reason to believe (even if incorrectly) that Easton had done things that placed the lives of some inmates in danger.

But there is and was no controlling authority on First Amendment rights enjoyed [*4] by an attorney for an inmate. Compare *Crusoe v. DeRobertis*, 714 F.2d 752, 756-57 (7th Cir. 1983) (holding that a paralegal failed to state a First Amendment claim where he was legitimately excluded from a state prison), with *Sturm v. Clark*, 835 F.2d 1008, 1013 (3d Cir. 1987) (finding that an attorney properly alleged a constitutional claim where a federal correctional institution's directive prohibited her from speaking to other visitors and to inmates for whom she did not have a visitation permit). The result is that the law was not clearly established, so even if Easton's allegations were sufficient to support a claim of constitutional violation, the State Defendants were properly entitled to qualified immunity, in any event.

AFFIRMED.

TOM EASTON, Plaintiff, v. JAMES FALLMAN, et al., Defendants.

No. C 99-4795 CRB

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2001 U.S. Dist. LEXIS 460

January 18, 2001, Decided

January 18, 2001, Filed; January 19, 2001, Entered in Civil Docket

DISPOSITION:
[*1] Plaintiff's motion for summary judgment DENIED and defendants' cross-motion for summary judgment GRANTED in part and DENIED in part.

COUNSEL:
THOMAS DEWEY EASTON, Plaintiff, Pro se, Bend, OR.

For TOM FELKER, HARLAN WATKINS, ROBERT AYRES, STEVEN CAMBRA, DAVID TRISTAN, CAL TERHUNE, defendants: Susan J. King, Anya Binsacca, CA State Attorney General's Office, San Francisco, CA.

For HARLAN WATKINS, ROBERT AYRES, defendants: Paul D. Gifford, James M. Humes, Deputy Attorney Gen., CA State Attorney General's Office, San Francisco, CA.

For HARLAN WATKINS, defendant: David P. Druliner, CA State Attorney General's Office, San Francisco, CA.

JUDGES: CHARLES R. BREYER, UNITED STATES DISTRICT JUDGE.

OPINION BY: CHARLES R. BREYER

OPINION:

MEMORANDUM AND ORDER

Now before the Court are plaintiff's motion for summary judgment and defendants' cross-motion for summary judgment. After carefully considering the papers filed by the parties, the Court concludes that oral argument is unnecessary, see Local Rule 7-1(b), and DENIES plaintiff's motion for summary judgment and GRANTS in part and DENIES in part defendants' cross-motion for summary judgment.

BACKGROUND

Plaintiff is an attorney authorized to practice law in California. In September 1996 the Warden of Pelican Bay state prison ("Pelican Bay"), defendant Steven J. Cambra, issued an order prohibiting plaintiff from visiting Pelican Bay. Four month later, in January 1997, defendant Cambra ordered that all mail from plaintiff to any Pelican Bay inmate be returned to sender, including confidential attorney-client mail. The mail ban was initiated in response to prison officials discovering that plaintiff had sent a letter to a prison inmate which, [*2] officials believed, placed another inmate's safety in danger.

On January 15, 1997, defendant D. Tristan, Deputy Director, Institutions Division, California Department of Corrections ("CDC"), ordered that plaintiff be excluded from access to all institutions of the CDC, and that the exclusion encompassed the loss of all privileges relative to attorney-client confidentiality, including correspondence, telephoning and visiting, and general visiting as well. Accordingly, officials at High Desert state prison have interfered, on a sporadic basis, with mail from plaintiff to inmates at High Desert.

The bans were implemented around the time prison officials were investigating plaintiff for "capping," that is, unlawfully soliciting business from Pelican Bay. In October 1996 the Del Norte County District Attorney ("DA") charged plaintiff with several felonies and a single misdemeanor of capping. He was tried in January 1997, acquitted of all the felonies, and convicted of the misdemeanor, based primarily on the testimony of a single witness, Pelican Bay inmate Michael Taylor.

Plaintiff's appeal of the misdemeanor conviction was unsuccessful. He subsequently filed a habeas corpus petition [*3] in April 1998 after receiving a declaration that demonstrated that Taylor had committed perjury during plaintiff's trial. The DA's Office subsequently provided him with discovery that further demonstrated that Taylor had lied. In light of Taylor's perjury, the Superior Court vacated plaintiff's conviction.

After his conviction was overturned, plaintiff wrote defendant Tristan and defendant Robert Ayers, the Pelican Bay Warden, seeking the elimination of the

bans on plaintiff's access to CDC inmates. Defendants did not respond and do not deny that the bans are still in effect.

PROCEDURAL HISTORY

Plaintiff's section 1983 civil rights lawsuit challenges the lawfulness of the bans on his access to CDC prisons and inmates. He seeks damages and an injunction ordering defendants to permit him to communicate with CDC inmates. He now moves for summary judgment against defendants Harlan Watkins, Robert Ayers, Steven Cambra, David Tristan, Cal Terhune, and James Gomez on the ground that the undisputed facts demonstrate that the bans violate his First Amendment right to freedom of speech and his rights to equal protection and due process under the Fifth and Fourteenth Amendments.

All [*4] defendants also move for summary judgment. Defendants Terhune, Ayers, and Watkins move for summary judgment on the ground that there is no evidence that these defendants violated plaintiff's constitutional rights. The remaining defendants move for summary judgment on the ground that they are entitled to qualified immunity on plaintiff's claim for damages. They also contend that as a matter of law they have not violated plaintiff's constitutional rights.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A principal purpose of the summary judgment procedure [*5] "is to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Unauthenticated documents cannot be considered on a motion for summary judgment. See *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). "To be considered by the court, 'documents must be authenticated by and attached to an affidavit that meets the requirements of [Rule] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.'" *Id. at 1550-51* (citation omitted). A document which lacks a proper foundation to authenticate it cannot be used to defeat a motion for summary judgment. See id.

"In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all reasonable [*6] inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). However, an inference may

be drawn in favor of the non-moving party only if the inference is "rational" or "reasonable" under the governing substantive law. See *Matsushita,* 475 U.S. at 588.

DISCUSSION

I. Defendants' Motion For Summary Judgment

A. Defendants Watkins, Ayers and Terhune

Defendant Watkins, Ayers and Terhune move for summary judgment on the ground that there is no evidence that these defendants had anything to do with the challenged orders. Plaintiff concedes that he has been unable to find any evidence that implicates defendant Watkins. He notes, however, that discovery has not yet closed for depositions. This response is insufficient to defeat Watkin's motion for summary judgment.

Federal Rule of Civil Procedure 56(f) provides that if a party opposing summary judgment demonstrates a need for further discovery in order to obtain facts essential to justify the party's opposition, the trial court may deny the motion for summary judgment or continue the hearing to allow for such discovery. [*7] In making a Rule 56(f) motion, a party opposing summary judgment "must make clear what information is sought and how it would preclude summary judgment." *Margolis v. Ryan,* 140 F.3d 850, 853 (9th Cir. 1998) (citation omitted). Plaintiff has not come close to meeting this standard; noting that discovery has not yet closed does not "make clear what information is sought and how it would preclude summary judgment."

While plaintiff concedes that Terhune and Ayers did not initiate the bans, plaintiff contends they could have rescinded the bans when they took over as CDC Director and Pelican Bay Warden, respectively. Plaintiff does offer undisputed evidence that he notified defendant Ayers of the ban at Pelican Bay and reiterated that the ban is unlawful. This evidence, in the absence of any evidence that defendant Ayers did in fact rescind the ban, supports a reasonable inference that defendant Ayers continued the Pelican Bay ban. Accordingly, summary judgment on the ground that defendant Ayers did not participate in the ban must be denied.

Plaintiff alleges that defendant Terhune refused to rescind the bans despite plaintiff's repeated requests to do so. The Court [*8] has been unable to locate any evidence in the record, however, that suggests that defendant Terhune was even aware of the visiting and mail bans, let alone that he refused to end the bans. See *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (holding that the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment"). Accordingly, defendant Terhune's motion for summary judgment must be granted.

B. Qualified Immunity

All remaining defendants move for summary judgment on the ground that they are entitled to qualified immunity from damages. State officials are protected by qualified immunity unless "the right the official is alleged to have violated ... [has] been 'clearly established.'" *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). In

evaluating a claim of qualified immunity, the Court must engage in a three-step inquiry. See *Kelley v. Borg,* 60 F.3d 664, 666 (9th Cir. 1995) (citing *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991)). n1 First, the Court must determine whether the plaintiff has alleged the deprivation [*9] of an actual constitutional right. See *Wilson v. Layne,* 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999). If he has, the Court must then determine whether that right was clearly established. See id. If the right was clearly established at the time of the defendants' actions, then the Court must consider whether a reasonable official in the defendants' position could have believed that his conduct was lawful. See *DeBoer v. Pennington,* 206 F.3d 857, 864 (9th Cir. 2000); id. at 867 (observing that "the inquiry is whether in light of the totality of the circumstances the defendants' actions were 'objectively reasonable'").

> n1 The Ninth Circuit has occasionally identified the qualified immunity inquiry as a two-step process by combining the first and second questions. See, e.g, *Collins v. Jordan,* 110 F.3d 1363, 1369 (9th Cir. 1997) (citing *Act Up!/ Portland v. Bagley,* 988 F.2d 868, 871 (9th Cir. 1993)).

The first two [*10] inquiries--whether an actual right was violated and whether that right was clearly established--typically present purely legal questions, but the third may require some factual determinations as well. See *Romero,* 931 F.2d at 628. "The determination of whether a reasonable officer could have believed his conduct was lawful given the

totality of the circumstances is a determination of law that can be decided on summary judgment if the material facts are undisputed." *Collins v. Jordan,* 110 F.3d 1363, 1369 (9th Cir. 1999). It is a defendant's burden to show that a reasonable officer could have believed that his conduct was lawful. See *id. at 1369.*

1. The facts surrounding the initiation of the bans

In connection with the summary judgment motions, defendants submitted a stack of exhibits that are not accompanied by an authenticating declaration. Accordingly, the Court may not consider them. See *Hal Roach Studios, Inc.,* 896 F.2d at 1550-51. The Court can, however, consider the declaration of Tom Felker and any properly-authenticated documents attached to his declaration. His declaration and those documents establish [*11] the following undisputed facts.

In July 1996, a Del Norte Superior Court Judge called defendant Felker, the litigation coordinator at Pelican Bay, and told him that an inmate, Michael Taylor, had sent the judge a declaration complaining about plaintiff. Taylor subsequently provided the declaration to Felker. The declaration alleged, among other things, that Easton had offered kickbacks to inmates that drum up business by creating lawsuits. On September 23, 1996, Felker sent a memorandum to Pelican Bay Warden Cambra listing the problems the prison had had with plaintiff since 1994. Felker Decl. P 9 and Exh. 2.

In his memorandum to Cambra, Felker identified fourteen separate incidents of what Felker deemed to be misconduct by Easton. These incidents included, among other things, (1) sending letters to an inmate

designated as attorney-client confidential when in fact the letters were personal in nature, (2) making a false report that a prison employee had threatened to firebomb plaintiff's house, (3) the California State Bar writing a letter to an official at Corcoran state prison indicating that it is issuing an official warning letter to plaintiff for sending personal mail to an inmate [*12] at Corcoran as official legal mail, (4) getting into altercations and shouting matches with staff when visiting inmates, and (5) Taylor's allegations. Felker concludes his memorandum with the following recommendation:

Although the District Attorney has not made a final decision on prosecution, we clearly have enough evidence against Easton to justify denying him entrance into the institution. His latest attempts of fabricating evidence by using inmates to "create lawsuits" only increases the possibilities of staff and inmate injury by contributing to the tensions between the different racial groups in A Facility.

I have contacted and discussed this matter with Christine Roloff of Legal Affairs. Her opinion was that we did have sufficient information to bar the attorney from the institution, but recommended that we hold off until the criminal investigation was concluded by the District Attorney's Office. She advised that at some point we would need to go in front of a judge to defend our action, but that the evidence was sufficient to justify our position. Especially since Easton has demonstrated a prolonged pattern of violating our security requirements.

I recommend [*13] that Tom Easton be barred from further entrance into the institution immediately based upon his demonstrated disregard for departmental regulations and his threat to the safety and security of the prison.

Felker Decl. Exh. 2, p. 2. The next day Cambra wrote plaintiff advising him that effective immediately he was excluded from entrance into Pelican Bay. The letter stated further that plaintiff could request an interview, and that after six months he could seek reinstatement. Plaintiff's Decl., Exh. 2. By letter dated October 17, 1996, Felker explained to plaintiff that he was "excluded from the institution based upon information which was provided to staff by various inmates incarcerated at Pelican Bay. The information included your attempts to suborn perjury by encouraging inmates to attest to untrue information, submitting letters in violation of the legal mail process, and your promise of 'kickbacks' to inmates who referred cases to you." Felker Decl., Exh. 4. Shortly thereafter, the Del Norte DA indicted plaintiff. In light of the indictment, plaintiff did not attend a scheduled interview with Pelican Bay officials.

On November 15, 1996, Felker notified the DA that plaintiff [*14] had sent legal mail to a Pelican Bay inmate which, rather than discussing legal matters pertaining to the inmate's legal case, discusses the pending criminal charges against plaintiff and the testimony of inmate Michael Taylor. The letter recites Taylor's name, number and cell location, and appears to threaten Taylor for testifying against plaintiff. Pelican Bay officials viewed the letter as a threat, and feared that plaintiff had sent the letter to the inmate

so that it would become known to the prison population that Taylor was cooperating with the authorities. In response to the letter, the Del Norte Superior Court issued a protective order prohibiting plaintiff from corresponding with inmates in any way that threatened the institutional security of Pelican Bay.

As a result of the protective order, Pelican Bay staff was permitted to inspect plaintiff's incoming mail. They discovered that plaintiff was using confidential mail to discuss his pending criminal case with inmates. In particular, in December 1996 he wrote at least two inmates and identified all of the witnesses who would be appearing for both the defense *and the prosecution* in his upcoming criminal trial. By letter [*15] dated January 15, 1997, defendant Cambra ordered that all mail from plaintiff, including "Legal Mail," be returned to sender. In the letter, Cambra explained that the order was based upon plaintiff having sent mail to the prison which could have placed an inmate's safety in jeopardy. Plaintiff's Decl., Exh. 6. That same day, defendant Tristan ordered that plaintiff be excluded from access to all CDC institutions. Plaintiff's Decl., Exh. 10. Accordingly, High Desert state prison ordered that all of plaintiff's mail, incoming and outcoming, be monitored.

Plaintiff argues that Felker's declaration is for the most part inadmissible hearsay, and that Felker was not the decisionmaker. Felker's declaration, and the documents attached to it, however, establish what Cambra knew at the time he made the decision to ban plaintiff from visiting Pelican Bay, and later from corresponding with any Pelican Bay inmates. In other

words, they are not offered for the truth of the matters asserted (that is, that plaintiff did in fact do what Felker accused of him of doing), but rather to show what defendants believed plaintiff had done.

2. Defendants are entitled to qualified immunity

a. The [*16] First Amendment claim

Defendants contend that they are entitled to qualified immunity because the law is not clearly established that plaintiff has a First Amendment right to access to prison inmates. For purposes of the qualified immunity analysis, government officials are charged with knowledge of constitutional and statutory developments, including all available decisional law. See *Gutierrez v. Municipal Court of the Southeast Judicial District,* 838 F.2d 1031, 1048 (9th Cir. 1988). To determine whether a right was clearly established courts ordinarily begin by attempting to determine whether the statutory or constitutional provision creating the right is unambiguous. Where the existence of the right is clear from the face of the provision, courts usually need go no further. However, where ambiguities exist, [courts] "look to whatever decisional law is available to ascertain whether the law is clearly established." ... In doing so, [the Court] may also consider the likelihood that [the Ninth Circuit] would reach the same conclusion as other courts that have previously considered the issue.

Id. The Ninth Circuit has noted that "the [*17] term 'clearly established right' may be somewhat misleading in that in some cases the relevant inquiry may more properly be described as: whether it is

clearly established that the particular act by the public official constitutes a violation of the right involved, rather than whether the right itself is clearly established." Id.

The record reflects three separate bans on plaintiff's access to CDC inmates: (1) the prohibition on plaintiff visiting any CDC prisons ("the visiting ban"), (2) the prohibition on plaintiff writing or telephoning inmates at any CDC prison (the "the communication ban"), and (3) the monitoring of legal mail from High Desert inmates to plaintiff ("the High Desert ban").

i. The visiting ban

Although the parties have not brought to the Court's attention any Ninth Circuit cases that address the First Amendment in the context of visiting a prison, both the Seventh Circuit and the D.C. Circuit have held that there is no First Amendment right to visit a prison. *Crusoe v. DeRobertis,* 714 F.2d 752, 755 (7th Cir. 1983) ("it is apparent that the First Amendment does not provide a right of access to prison facilities"); *Phillips v. Bureau of Prisons,* 192 U.S. App. D.C. 357, 591 F.2d 966, 975-76 (D.C. Cir. 1979) [*18] (holding that inmates do not have a First Amendment right to a face-to-face meeting with paralegals). The Third Circuit has held that an attorney stated a claim for violation of her First Amendment rights by challenging an order that the attorney visit a prison only upon twenty-four hours notice, and between the hours of 8:30 a.m. and 3:30 p.m. *Sturm v. Clark,* 835 F.2d 1009, 1011, 1013-1016 (3d Cir. 1987). The court held that because the plaintiff alleged that the restriction on her visiting

rights involved "latent content bias," traditional First Amendment analysis applied; the government must demonstrate that its limits on the attorney's speech are necessary to serve a compelling interest and are narrowly tailored. *Id.* at 1015-16.

The above available decisional law does not demonstrate that plaintiff has a clearly established First Amendment right of access to prisons. While Sturm arguably supports plaintiff's claims, Crusoe and Phillips do not. For that reason alone defendants are entitled to qualified immunity on plaintiff's claim that the visiting ban violates his First Amendment rights.

Moreover, based on the undisputed record before [*19] the Court, a reasonable official in the defendants' position could have believed that his conduct was lawful. See *DeBoer,* 206 F.3d at 864. First, there is no caselaw that suggests that a prison cannot bar an attorney who consistently violates prison regulations from visiting prisons. Second, Cambra was advised that the prison's legal counsel had said that the prison had sufficient information to justify barring plaintiff from to Pelican Bay. Third, two courts refused to preliminarily enjoin implementation of the visiting ban on the ground that the First Amendment does not provide a right of access to prisons. *Hymes v. Bridges*, 96-1899 SI, March 11, 1997 Order at 10; *Shepard v. Malan*, 97-0891 MMC March 15, 1999 Order; see also *MGIC Indem. Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir. 1986) (stating that a court may take judicial notice of pleadings in another lawsuit). The CDC regulations cited by plaintiff do not suggest otherwise. Thus, defendants'

motion for qualified immunity with respect to the visiting ban must be granted.

ii. The communication ban

Defendants have also precluded plaintiff from sending any correspondence to prison [*20] inmates. This broad ban, which effectively leaves plaintiff with no alternative means of communicating with inmates, and thus ended his prisoner legal practice, raises First Amendment concerns. The Supreme Court has acknowledged that free citizens, such as inmate family members, journalists, and attorneys have a legitimate First Amendment interest in communicating with inmates. *Thornburgh v. Abbott,* 490 U.S. 401, 407-08, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989); see also *Massey v. Wheeler,* 221 F.3d 1030, 1036 (7th Cir. 2000) (describing Thornburgh's recognition of those with First Amendment interests in access to inmates).

The relevant inquiry here, however, is whether it is clearly established that the bans violated plaintiff's First Amendment rights. In *Procunier v. Martinez,* 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974), the Supreme Court applied a demanding standard of review to determine whether a prison mail censorship regulation impaired the First Amendment rights of non-inmates. *Id.* at 413-14. The Supreme Court subsequently held, however, that a prison regulation does not violate a prisoner's [*21] First Amendment right if the restriction is reasonably related to legitimate penological interests, see *Turner v. Safley,* 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), and limited the demanding standard of Martinez to the monitoring of a prisoner's outgoing

mail. *Thornburgh,* 490 U.S. at 413. This relaxed standard "is necessary if 'prison administrators ... , and not the courts, are to make the difficult judgments concerning institutional operations.'" Id. (quoting *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 128, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977)); *Washington v. Harper,* 494 U.S. 210, 224, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) (Turner applies whenever "the needs of prison administration implicate constitutional rights").

Plaintiff cites Sturm for the proposition that his First Amendment claim should be reviewed under the more demanding standard of conventional First Amendment doctrine. In Sturm, the Court decided to apply the demanding standard to an attorney's claim that restrictions on her visits with inmates (providing twenty-four hour notice and limiting the [*22] hours she could visit) violated her First Amendment rights. The Third Circuit reasoned that the very fact of prisoners' incarceration necessarily implies that they pose a risk, and more often, a danger to society. Although attorneys may at times present their own peculiar risks, they ordinarily do not implicate a prison's interest in deterring crime, in encouraging rehabilitation, or in insuring institutional security. Although plaintiff's claim is made in the context of a penal ambience, we must evaluate it in light of conventional first amendment doctrine, and not in light of the less demanding standard involving only prisoners' rights. *Sturm,* 835 F.2d at 1014. This reasoning does not apply to the record in this case. Defendants prohibited inmates from receiving mail from plaintiff precisely because they concluded that he does pose a threat to the institutional security of

the prison; the evidence reflects that he abused the legal mail privilege to disclose the identity and location of a cooperating inmate and thus placed that inmate's life at risk. Moreover, even after he knew his mail was being monitored he continued to disclose the identity of [*23] inmates who would be testifying on behalf of the prosecution.

In any event, the above discussion amply demonstrates that it is not clearly established that conventional First Amendment doctrine applies to plaintiff's First Amendment claim. At best, it is clearly established that the communication ban must be reviewed under at least the Turner standard. Under that standard, four factors guide reviewing courts in assessing whether a prison regulation which impinges on constitutional rights is rationally related to legitimate penological interests: 1) the existence of a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; 2) the existence of alternative means of exercising the right that remain open to prison inmates; 3) the impact that accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and 4) the absence of ready alternatives as evidence of the reasonableness of the regulation. *Turner,* 482 U.S. at 89-91. It is not clearly established that the ban on plaintiff's incoming mail at Pelican Bay and High Desert [*24] violated plaintiff's First Amendment rights under this standard, or any standard. Plaintiff has not cited a single case, and the Court is aware of none, in which a court held that a prison violated an attorney's First Amendment rights by barring that attorney from

sending incoming prison mail under facts even remotely similar to this case, namely, plaintiff's repeated violation of the legal mail privilege. Moreover, the CDC regulations upon which plaintiff relies do not establish that he has an absolute right to correspond with inmates.

Defendants are also entitled to qualified immunity for continuing the communication ban after plaintiff's misdemeanor capping conviction was vacated. A reasonable official in defendant's position could have believed that the ban was still lawful after the reversal in light of the myriad of reasons, independent from plaintiff's alleged capping, that gave rise to the ban. Indeed, another court refused to rescind the ban even after the Superior Court granted plaintiff's habeas petition. *Hymes v. Bridges*, C 96-1899 SI Nov. 2, 1998 Order.

iii. The High Desert ban

Under *Martinez*, censorship of prisoner mail between prisoners and non-prisoners [*25] violates the First Amendment unless the censorship furthers an important or substantial government interest unrelated to the suppression of expression and the restriction must be no greater than is necessary to protect the governmental interest. 416 U.S. at 413-114; see also *Thornburgh*, 490 U.S. at 413 (limiting *Martinez* to outgoing mail). "Legal mail" from High Desert inmates to plaintiff is opened and reviewed before being forwarded to plaintiff, or is returned to the inmates. Defendants justify the restriction based upon plaintiff's past abuse of the legal mail privilege, and in particular, his disclosure of inmate Taylor's cooperation, identity, and location, thereby placing

Taylor's life in jeopardy. Plaintiff has not cited any case that suggests that the law is clearly established that such a restriction under these circumstances violates the First Amendment. Nor does plaintiff claim that he had a valid reason for identifying Taylor; rather, his remarkable response is that Taylor placed his own life in danger by becoming a snitch. In any event, a reasonable official in defendants' position could have objectively believed that such a restriction [*26] is lawful.

b. The Equal Protection Claim

The law of equal protection is well-established; defendants' bans on plaintiff's communication with CDC inmates does not violate the equal protection clause if they are rationally related to a legitimate government interest. *Sturm*, 835 F.2d at 1016; see also id. (noting that the practice of law is not a fundamental right and therefore the rational relationship test applies). A reasonable officer in defendants' position could objectively believe that the bans are rationally related to the prison systems' legitimate interest in prison security. Plaintiff has not cited any law that suggests otherwise. Accordingly, defendants are entitled to qualified immunity on plaintiff's equal protection claim.

c. The Due Process Claim

Plaintiff also appears to contend that the bans violated his Fifth and Fourteenth Amendment due process rights. He does not cite any cases, however, in which a court found that prison regulations violated an attorney's due process rights, let alone a case that suggests that the law is clearly established

that plaintiff's due process rights were violated here. Accordingly, defendants are also [*27] entitled to qualified immunity on plaintiff's due process claim.

C. Injunctive Relief

Since the Court has determined that defendants are entitled to qualified immunity on plaintiff's claims for damages, the only remaining claim in this lawsuit is plaintiff's claim for injunctive relief. To determine whether plaintiff is entitled to injunctive relief rescinding or modifying the bans, the Court must determine whether the bans in fact violate plaintiff's constitutional rights. Defendants argue, in part, that the bans are constitutional because plaintiff has an alternative means of communication available to him, namely, non-confidential correspondence with inmates. Defendants' memorandum at 27-28. However, the January 15, 1997 memo from Pelican Bay Warden Cambra states:

Effective immediately, and until further notice, all mail to **any** inmate from Attorney Tom Easton will be returned to sender.

Under no circumstances is any mail form this individual, either legal or regular, to be forwarded to an inmate housed at Pelican Bay State Prison. All mail that has been forwarded from the mailroom for delivery will be promptly returned for processing back to the addressee. [*28]

Plaintiff's Decl., Exh. 6. Defendants identify nothing in the record that suggests that they have modified this Pelican Bay policy. The Court cannot even begin

to determine whether injunctive relief is warranted until the record is clear as to the state of the bans presently imposed by the CDC.

II. Plaintiff's Motion For Summary Judgment

Since the Court has granted defendants' motion for summary judgment as to the claims for damages, plaintiff's motion for summary judgment must be denied. In addition, plaintiff has not established as a matter of law that he is entitled to injunctive relief.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED with respect to defendants Terhune and Watkins as to all claims, and with respect to the remaining defendants, including defendants Felker and Ayers, as to plaintiff's claims for damages. Defendants' motion for summary judgment with respect to injunctive relief is DENIED.

The parties are directed to appear at a status conference at 8:30 a.m. on February 2, 2001 to determine how to proceed with the claim for injunctive relief. [*29] Any party that wishes to appear by telephone shall advise the Court's clerk by January 30, 2001.

IT IS SO ORDERED.

Dated: January 18, 2001

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed January 2, 2004

THOMAS DEWEY EASTON,	No. 01-16568
Plaintiff-Appellant, -v.	D.C. No. CV-99-04795- CRB (JL)
JAMES FALLMAN; et al.,	Northern District of California,
Defendants- Appellees, and,	San Francisco
JEFFREY M. BRIDDLE; et al., Defendants.	ORDER

Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing en banc is DENIED.